Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

CHARLIE ANNIS, MARY K. BERGEN, JERRY BRITTAIN, GORDON CALERWOOD, WALTER CROW, QUINTON DAVIS, DON FIELDS, BOB GLANDON, TOM HAMILTON, DON HANLEY, LARRY HENSLEY, LARRY HILLYARD, BOB HURST, LEROY KEENER, JERRY C. MILLER, DOYLE MILLS, BOB NEELY, K. DON RISINGER, JERRY STURGEON, BILL VILLINES AND DEE WELLS

Petitioners

v.

OKLAHOMA LAW ENFORCEMENT RETIREMENT BOARD; ROY ROGERS; LINDA AKER, SCOTT BEHANNA; RENDA REESE-DAVIS; MICHAEL DIXON; JIM KING; JUNE KLAASSEN; KEITH LEIMBACH; JAN MILLER; JAMES PETE PETERSON; HARRY ROSENGRANTS; KEVIN WARD; AND PHILIP R. KEY

Respondents

On Petition for Writ of Certiorari To the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

1. Whether the Tenth Circuit Court of Appeals erred when it found that legislation passed following the decision in this case by the Western District Court prevented the Petitioners from suffering any continuing or future damages, thus Petitioners' action was moot, and did not find that the passage of specific, "ex post facto law" by legislature to solely designed to eliminate Petitioners' cause of action is unconstitutional and in violation of Article II, Section 15 of the Oklahoma Constitution?

2. Whether the Tenth Circuit Court of Appeals erred when failed to considered the issues raised by Petitioners finding that any claims by Petitioners were barred by the statute of limitations, notwithstanding that there is no Oklahoma statute of limitations with respect to challenging the constitutionality of legislative action?

3. Whether the Tenth Circuit Court of Appeals erred when it refused to find that the trial court's decision, which changed and altered the "existing rights" of Highway patrolmen to the benefits of a pension program into which they had paid contributions for years, is in direct violation of 74 Okla. Stat. (2000) §923?

4. Whether the Tenth Circuit Court of Appeals erred when it refused to consider that an action to recover vested or owned property is not barred an statute of limitations found in Oklahoma law?

5. Whether the Tenth Circuit Court of Appeals erred when it failed to find that there is no statute of limitation found in Oklahoma law which would barr an action brought for a declaratory judgment seeking prospective relief only?

PARTIES TO THE PROCEEDINGS

The following parties were named as Plaintiffs in the case and are currently appearing as Petitioners:

CHARLIE ANNIS, MARY K. BERGEN, JERRY BRITTAIN, GORDON CALERWOOD, WALTER CROW, QUINTON DAVIS, DON FIELDS, BOB GLANDON, TOM HAMILTON, DON HANLEY, LARRY HENSLEY, LARRY HILLYARD, BOB HURST, LEROY KEENER, JERRY C. MILLER, DOYLE MILLS, BOB NEELY, K. DON RISINGER, JERRY STURGEON, BILL VILLINES AND DEE WELLS

The following parties were named as Defendants in the case and are currently appearing as Respondents:

OKLAHOMA LAW ENFORCEMENT RETIREMENT BOARD; ROY ROGERS; LINDA AKER; SCOTT BEHANNA; RENDA REESE-DAVIS; MICHAEL DIXON; JIM KING; JUNE KLAASSEN; KEITH LEIMBACH; JAN MILLER; JAMES PETE PETERSON; HARRY ROSENGRANTS; KEVIN WARD; AND PHILIP R. KEY

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PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

1. On April 24, 2003, the Tenth Circuit Court of Appeals affirmed the decision entered by the United States District Court for the Western District of Oklahoma.

2. No Petition for rehearing was filed.

3. Judgment was entered in the District Court for Western Oklahoma on July 19, 2002, without published opinion.

JURISDICTIONAL STATEMENT

Petitioners seek review of the Tenth Circuit decision rendered in their case on April 24, 2003. No petition for rehearing was filed in the case. No extension to file for a writ of certiorari has been sought in this case. Jurisdiction is proper pursuant to Supreme Court Rule 10.1(c), which allows the Court to assume jurisdiction in a case where "a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court."

STATUTORY PROVISIONS AT ISSUE

United States Constitution, Fourteenth Amendment

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Oklahoma Constitution, Article 2, Section 15

15. Bills of attainder - Ex post facto laws - Obligation of contracts.

No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed. No conviction shall work a corruption of blood or forfeiture of estate: Provided, that this provision shall not prohibit the imposition of pecuniary penalties.

Oklahoma Constitution, Article 5, Section 54

§ 54. Repeal of statute - Effect.

The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute.

Title 74, Oklahoma Statutes, Section 923(A)

A. Except as otherwise provided by this section, no alteration, amendment, or repeal of this act shall affect the then existing rights of members and beneficiaries, but shall be effective only as to rights which would otherwise accrue hereunder as a result of services rendered by an employee after such alteration, amendment, or repeal. Any annuity, benefits, fund, property, or rights created by or accruing to any person under the provisions of this act shall not be subject to execution, garnishment or

attachment, or any other process or claim whatsoever, and shall be unassignable, except as specifically provided by Section 901 et seq. of this title.

STATEMENT OF THE CASE

Petitioners, Charlie Annis (as the representative of the group) and the other Oklahoma State Troopers, (collectively "Petitioners"), respectfully request this Court to exercise its discretion and grant certiorari in the above captioned case to review the opinion rendered by the Tenth Circuit Court of Appeals on April 24, 2003. Rehearing was not requested. Certiorari is proper in this case not only because the decision of the Court of Appeals is in conflict with previously established law, but also because the Court departed form the accepted and usual course of judicial proceedings in failing to apply the law of Oklahoma to the facts as found by the Trial Court. The decision fails to consider the important and critical constitutional rights of the parties and thus must be vacated. Both Oklahoma and federal law justify action by this Court.

STATEMENT OF FACTS

The Petitioners in this case were all patrolman of the Oklahoma Highway Patrol who have retired from the Oklahoma Department of Public Safety. Petitioners became vested in their retirement plan prior to July 1, 1980, though many of them continued as active troopers for many more years, following the vesting. Although each trooper retired on a different date, the issues of law are identical as applied to each individual Petitioner's cause of action.

Without exception, at the time each of these Petitioners were hired by the Oklahoma Department of Public Safety, the retirement plan in effect to be applied to each individual by the

Statute Troopers' retirement board required payment of fifty percent (50%) of a base trooper's salary as retirement benefits. Under the applicable formula, each time the base trooper salary increased, all retired troopers were to receive an increase in retirement benefits as established in 47 O.S. § 2-305 (pre-July 1, 1980).

In the present action, these Petitioners retirement benefits were vested prior to July 1, 1980. Notwithstanding the fact that Oklahoma law specifically provides that vested pension benefits cannot be changed by legislative enactment under Oklahoma Law, on July 1, 1980 the Oklahoma Legislature enacted legislation which changed the formula for pension benefits such that rather than granting an automatic increase in benefits following a raise in base trooper pay, the benefit paid was based on a percentage of the last five (5) years wages. 47 O.S. § 2-305.

Under the statutory 1980 formula (Okla. Stat. supra), there was no automatic increase in the pension benefits and the pension amount remained static. The Respondent, Oklahoma Law Enforcement Retirement Board ("Respondent") applied the new 1980 formula to the retirement benefits due each of these Petitioners notwithstanding the fact that they had each vested under the pre-1980 law. The application of the different formula caused each Petitioner to receive a lesser amount of benefit than would have been due had retirement been taken at the time the plan vested.

The present action was filed on March 8, 2001, which was more than twenty years after the 1980 legislation, but at different lengths of time from the date of each Petitioner's retirement. Respondent filed a Motion to Dismiss, claiming that the Oklahoma statute of limitations had run on the claims. The trial court granted the motion in a Memorandum Order of

March 5, 2002.

Following the entry of the March 5, 2002 judgment, the Oklahoma legislature amended Okla. Stat. Tit. 47, §2-305, to re-instate the original formula that would allow the proper payment of benefits to Petitioners effective on July 1, 2002. Because the legislative action granted the prospective relief previously requested by Petitioners, the Tenth Circuit Court of Appeals ruled that Petitioner's appeal was moot.

ARGUMENT AND AUTHORITIES

OVERVIEW

More than one hundred years ago, in ***Chicago & Grand Trunk R. Co. v. Wellman***, 143 U.S. 339, 345, 12 S.Ct. 400, 36 L.Ed.2d 176 (1892), this Court recognized its very important role in determining the rights of an individual against the acts of government. This principal is no less true today than it was at the time the decision was rendered. In keeping with this important goal, this Court should exercise its discretion and grant certiorari in the present case in order to vindicate the significant constitutional rights of these Petitioners who spent their careers protecting Oklahoma citizens.

Although this case presented identical issues to those found in ***Baker v. Oklahoma Firefighters Pension and Retirement System***, 1982 OK 8, 718 P.2d 348, a completely different result was reached by the federal courts. Both cases involve with state employees seeking to recover retirement benefits based upon repealed/amended statutes. In ***Baker***, the Oklahoma Supreme Court held that pension benefits may not be changed once an employee becomes vested:

"Those firefighters and police offices who had

> retired or who could have retired and became eligible for payment of pension benefits prior to the effective dated of the repeal of the pension adjustment provisions acquired a right under those provisions which may not be detrimentally . . ."

The decision by both the trial court and the Tenth Circuit Court of Appeals ignores important principles of Oklahoma law and federal constitutional due process rights. This Court must intervene to ensure that the rights of these law enforcement Petitioners are vindicated and that they receive the pension benefits which were promised to them by the State of Oklahoma.

PROPOSITION I

THE TENTH CIRCUIT COURT OF APPEALS VIOLATED THE TERMS OF THE OKLAHOMA CONSTITUTION WHEN IT FOUND THAT SUBSEQUENT ACTION BY THE OKLAHOMA LEGISLATURE MOOTED THE ALLEGATIONS OF PETITIONERS' CLAIMS.

It is very clear under Oklahoma law that subsequent actions taken by the Oklahoma legislature may not be applied to moot an existing cause of action. As set out previously in this Petition, the terms of Article 5, § 54 of the Oklahoma Constitution could not be more specific with respect to this issue. The statute states unambiguously "nor shall such repeal affect any accrued right . . . or proceedings begun by virtue of such repealed statute." Undeniably, the Tenth Circuit failed to

consider the effect of this important constitutional protection when it refused to consider Petitioners' claims on the merits.

Additionally, the terms Article II, Section 15 of the Oklahoma Constitution were not considered by the court, which prevent the passage of specific, "ex post facto law" by legislature to solely designed to eliminate Petitioners' cause of action is unconstitutional and in clear violation of the Oklahoma constitution. Certiorari should be granted in this case to allow Petitioners to proceed with their claims.

PROPOSITION II

THERE IS NO STATUTE OF LIMITATIONS WITH RESPECT TO CHALLENGING THE CONSTITUTIONALITY OF LEGISLATIVE ACTION, THUS THE TENTH CIRCUIT COURT ERRED WHEN IT FAILED TO ADDRESS THE MERITS OF THE ACTION.

While Respondents have consistently disputed the proposition that there is no limitation period which restricts the challenge to legislative action, they have never cited any law or authority which specifically establishes their point. It is the obligation of a proponent of a position to support the defense. There is no statute of limitations which specifically applies in this case, thus, Respondents were never able to provide such authority. The Tenth Circuit Court of Appeals' reference to the general statute of limitations applicable with respect to actions sounding in tort or contract are quite simply not applicable in this action.

Because there is no statute of limitations applicable to a challenge to the unconstitutionality of legislation, it is

impossible to cite to specific authority; however, examples of the concept are replete in the law. A primary example can be found in death penalty litigation.

Despite the fact that the death penalty was legal in nearly every state for decades prior to 1972, this Court found no time bar to consideration of the constitutionality of the punishment in 1972, when it declared the death penalty to be a violation of the Eighth Amendment prohibition against cruel or unusual punishment in ***Furman v. Georgia***, 408 U.S. 238 (1972). The same was true when the Court considered the constitutionality of the execution of juveniles in ***Thompson v. Oklahoma***, 487 U.S. 815 (1988),

Similarly, the Oklahoma Supreme Court failed to consider a limitations period in ***General Motors Corp. v. Oklahoma County Board of Equalization***, 1983 OK 59, 678 P.2d 233, where it found that a taxation plan passed in 1961 was unconstitutional as applied to the Oklahoma City General Motors factory. The affirmative defense of statute of limitations was not even an issue in the case.

The same was true in ***State ex Rel. Tharel et al. v. Board of County Com'rs of Creek County,*** 188 Okla. 184, 1940 OK 468, where the court held in the syllabus,

> "The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed. It imposes no duties, confers no rights, bestows no power or authority on anyone, affords no protection and justifies no acts performed under it."

The court explained that "if the Legislature has not acted within the framework of the Constitution, it has not acted. An unconstitutional statute confers no rights, creates no liability, and affords no protection. ***Norton v. Shelby County***, 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178." The court also noted the holding in ***Zane v. Hamilton County***, 189 U.S. 370, a case involving county bonds which were issued pursuant to a statute which was later declared to be unconstitutional. This Court held that because the bonds were illegally issued, there was no contract subject to the protection of the Federal Constitution. The Court quoted §16A Am.Jur.2d, Constitutional Law, 688, which states:

> "The Federal Constitution does not protect contracts which are invalid, illegal ... That which is not an enforceable contract right is not an obligation which can be impaired within the meaning of the constitutional prohibition. The impairment of a contract cannot occur where the alleged contract is based on a proviso contained in a void statute. A contract which rests on an unconstitutional statute is itself void and creates no obligation to be impaired by subsequent legislation."

See also ***State v. Humdy***, 1994 OK CR 35, 875 P.2d 429, where the Oklahoma Court of Criminal Appeals, in 1994, found a 1981 amendment to a criminal statute to be unconstitutional.

In short, jurisdiction was properly established in the district court to consider the constitutional application of a statute to a particular situation at any time the issue is appropriately before the court. The statutes of limitation cited by Respondents are applicable only at the time when an action for damages is brought based on the effects of the

unconstitutional pension plan in effect. ***Without exception, the cases cited by Respondents in their briefings below, deal with specific acts to which specific statutes of limitation may be applied.*** There is no such claim in this action to which the general limitations statutes may be applied. This litigation must be considered on the merits. Both the trial court and the Court of Appeals erred when such consideration was not made.

PROPOSITION III

BECAUSE OF THE UNIQUE NATURE OF PENSION FUND BENEFITS AS DEFINED BY OKLAHOMA LAW, THE LEGISLATIVE ACTIONS TAKEN BY THE OKLAHOMA LEGISLATURE MUST BE SCRUTINIZED BY THIS COURT.

Oklahoma law is clear that once a law enforcement officer has vested in the plan, the contractual nature of the obligation changes to an inalienable property right. See 25 Okl. Op. Atty. Gen. 109 (March 28, 1996). The opinion could not be more clear that the pension benefits offered by Respondents are significantly different from those offered to other public employees.

In its opinion, the Attorney General finds that the rights of a pensioner of OLERB pension benefits were different from those of other public employee pension funds. The Attorney General noted that the Oklahoma Supreme Court, in ***Baker v. Oklahoma Firefighters Pension and Retirement System***, 1982 OK 8, 718 P.2d 348, found that because of the twenty year period required for vesting in either the Firefighters' pension fund or the Law enforcement pension fund, "the right to the retirement pension benefits provided to firefighters and police officers under our state statutory schemes becomes absolute at the time those benefits become payable to those eligible....."

(Emphasis ours)

In addition to these specific cases, Oklahoma law is very clear that once a property right vests, it cannot be changed by either legislation or judicial action. See ***Ricks Exploration v. Okl. Water Resources Bd.,*** 695 P.2d 498 (Okl. 1984)(a vested right, once created, becomes absolute and is protected from legislative invasion). The important distinction between a vested, inalienable property right and that of a right arising from contract is critical in this case. Accordingly, statutory regulation of rights under contracts is completely inapplicable in this case, as is any case involving a specific claim of damages as a result of.

In short, the present case requires this Court to recognize that the questioned legislation presents an issue with respect to the property rights of the officers involved. It is not simply an action sounding in tort or contract seeking damages for a breach. These officers were vested in their pension, yet the legislature acted in a manner which impaired their right to benefits. This impairment continues each and every month as the appropriate amount of retirement pay is not paid as required. To deny these Appellants an opportunity at any point to challenge the withholding of their hard-earned retirement dollars on any basis, particularly a contract limitations defense, is to countenance a continuing wrong.

This is not a case which presents a debtor-creditor relationship between the parties, to which breach of contract analysis and limitations is applicable. Respondents are in a fiduciary relationship to each Petitioner and are holding and refusing to pay appropriate amounts of retirement money—money the right to which has been fully vested. This litigation should have been allowed to proceed on the merits and the Tenth Circuit opinion denied this right to Petitioners. This

Court must intervene to prevent the subversion of justice and the denial of important constitutional rights to Petitioners.

CONCLUSION

The petitioner for writ of certiorari should be granted.

Respectfully submitted,

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Counsel for the Petitioners

JULY, 2003

APPENDIX

APPENDIX A
Filed March 5, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV 01-418A (Marten)

MICKEY D. ADAM, et al,

Plaintiffs,

v.

OKLAHOMA LAW ENFORCEMENT RETIREMENT BOARD as set forth in Oklahoma Statutes Title 47 Sections 2-300 et seq., et al.,

Defendants

MEMORANDUM ORDER

Currently before the court in this action challenging the Oklahoma system of law enforcement retirement benefits is the motion by the defendants to dismiss on the grounds that the action is barred by the statute of limitations. Plaintiffs challenge the constitutionality of the Oklahoma legislature's decision in 1980 to alter the formula for retirement benefits. Plaintiffs are former highway patrolmen who were vested in the retirement system by July 1, 1980.

The present action was filed on March 8, 2001, over twenty years after the challenged legislation. Despite

repeated opportunities, plaintiffs have never effectively addressed the issue of the statute of limitations, other than speculating, without authority, that either no statute of limitations applies to their claim, or that the complaints may somehow be maintained pursuant to 12 O.S. §101. The general Oklaoma Statute of Limtiations, 12 O.S. Supp. 2000 §95, governs the action. It provides:

> Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:
>
> 1. With five (5) years; An action upon any contract, agreement or promise in writing;
>
> 2. Within three (3) years; An action upon a contract expressed or implied not in writing; an action upon a liability created by statute other than a forfeiture or penalty; and an action on a foreign judgment;
>
> 3. Within two (2) years; . . . an action for injury to the rights of another.

Here, the cause of action began at the time of the challenged legislative act. See *Gilbert v. City of Cambridge*, 745 F. Supp., 42, 46 (D. Mass. 1990). Pursuant to subsection 2 of the statute of limitations, the plaintiffs had three years from

action asserting violation of state constitution was a claim "upon a liability created by a statute" within meaning of the statute of limitations). But, even assuming the longest statute of limitations period (five years for actions upon contract) applied, the present action's claims asserting state constitutionality violations would remain outside the time permitted by law. With respect to plaintiff's claims asserting violation of the federal constitution, such claims are subject to the two-year limitations period of ran action "for injury to trights of another." *Meade v. Grubbs*, 841 F.2d 1512. 1522-24 (10th Cir. 1988).

There is no tolling doctrine or other exception to the time bar applicable in the rpesent action. For example, there is no conflict between defendants' actions and existing Oklahoma or federal statutes. *Cf. Elelphant Butte Irr. Dist. V. Department of Interior*, 160 F. 3d 602 (10th Cir. 1998). Section 101, which provides for tolling of the statute in certain cases such as partial payment of an acknowledged debt or upon an open account, has no application herein. Plaintiffs have wholly failed to demonstrate the payment of any disputed amounts by the defendants any written acknowledgment of an existing liability, or a promise in writing signed by the defendants to pay the claims of the plaintiffs.

In sum, the time bar of §95 applies. Plaintiffs have failed to identify any credible basis for avoiding application of the bar.

IT IS ACCORDINGLY ORDERED this 27th day of February, 2002, that the defendants' Motion to Dismiss is hereby granted.

J. THOMAS MARTEN, JR.
ENTERED ON JUDGMENT DOCKET ON MAR 5, 2002

APPENDIX B

FILED 4-23-02

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 02-6246
D.C. No. CIV-01-418-M
(Western District of Oklahoma)

MICKEY D. ADAM; CARL ALEXANDER; FLOYD W. ALLEN; JACK L. ALLEN; JAY E. ANGLIN; CHARLES F. ANNIS; PERRY R. RABB; AUTHER DEWAYNE BARNES; LARRY T. BARTON; K. B. BERGEN; CHESTER BLACK; DAVID D. BLACKBURN; BILL BLUE; S. T. BOLDING; CLAUDE L. BOLLENBACH; JERRY ZANE BRITTAIN; BOBBY BURLESON; ROBERT L. BURCH; ED C. BURR; GORDON W. CALERWOOD; JOSEPH E. CAMPBELL; JOE E. CANTRELL; OLEN M. CARR; L. H. CHILDRISS; MADISON H. CLINTON; JIM 0. COFFMAN; GERALD COLEMAN; DON COMPTON; JOE DAVID COOK; JOE COOKSON; ALLEN CORDER; CHARLES D. CRABTREE; ROGER A. CRANE; DELBERT L. CROUCH; WALTER CROW; JIMMIE DAVID; JONANN DAVIS; JOHN H. DAVIS; QUTHER LEE DAVIS; QUINTON

DAVIS; JIMMY A. DOANE; MICHAEL D. DUGGAN; JAMES R. DUNCAN; WILLARD J. EDGE, SR.; WANDA ELLIOTT; LUE E. ELLISON; FRANK EVERETT; AMOS HENRY FARR;KENNETH E. FERGARSON; DON FIELDS; J. D. FILIPSKI; ROBERT E. FOLTZ; JAMES C. FOX; FRANCIS JAMES FRECHER; B. W. FREEMAN; ARTHUR L. GARNER; JOE GIST; ROBERT U. GLANDON; JOHN B. GLATIAN; ALTON GRANT; JACK C. GREEN; MONTE M. GREEN; DONALD A. A. HALL; THOMAS M. HAMILTON; J. W. HAMMANS; RONNIE G. HAMMOCK; DON A. HANLEY; JAMES E. HARDIN; TOMMY 1. HARRIS; MIKE HARRISON; GEORGE HAUGEN; KARL HELLEN; LARRY G. HENISEY; DONALD R. HENLEY; JAMES R. HENLEY; LARRY L. HILLYARD; BILL HOLLARS; DON L. HOOD; FRED HORN; L. D. HORSTKOETTER; VIRGIL HOUSLEY; CURTIS D. HUGGINS; ROBERT E. HURST; DAVID IRWIN; DONALD M. JAMES; STEPHEN J. JANTZ; MERLIN JOHNS; PAUL N. JOHNSON; RONALD L. JOHNSON; JAMES R. JONES; LEE R. KEENER; LARENCE W. T. KELLY, JR.; L. D. KIRK; JUANITA KIZZIAR; ELMER R. KLEPPEL; RONALD G. KNOX; SAMUEL F. LAFFOON; KENNETH LANDES; TOM H.

LAVALLEY; WALTER LOY LEE; FRED LEVALLEY; JIM E. LOWER; JOHN MCBRIDE; CLIFFORD 0. MCCALL; RICHARD MCVAY; CLAY C. MILLER; JERRY C. MILLER; DOYLE MILLS; WILLARD MILLS; CARL D. MORELAND; DANNY W. MULLINS; DEAN P. NEAL; ROBERT DALE NEELY; CHARLES D. NEWTON; ANTHONY NICHOLS; DOUGLAS A. NICHOLS; ROBERT L. OARD; JIM D. PARKER; L. W. PARKER; LIBERTY W. PARKER, JR.; BOBBY R. PERRY; GARRY PIERCE; JOHME L. POTTS; DON D. POWELL; DONNIE POWERS; DAVID D. PRUITT; ROBERT L. QARD; JAMES T. RANDOLPH; MICKEY R. RAYBUR1'~; THOMAS R. RICHARDSON; VERNON L. RIDDLE; K. D. RISINGER; PAUL ROARK; GLYNN R. ROBERTS; ELMER L. ROBERTS; BILL D. ROBINS; DANIEL PAUL ROBINS; WOODROW F. ROBINSON; WILLIAM L. ROGERS; HAROLD DEAN ROLAND; JIM ROLLER; WILLIAM R. ROSENTHAL; DON BERR ROUSH; ARVIL G. RUDD; DON SANDS; DON SAVAGE; L. DUTCH SCHNEIDER; HARLEN T. SCOTT; BILL D. SHOBE; HERMAN H. SKELTON; GLEN SLAUGHTER; JOHN WAYNE SMITH; KENNETH SOUTHARD; JERRY STURGEON; NORMAN TALLY; RUSSELL TAYLOR;

SEQUOYAH JOHN TAYLOR; RONALD L. THOMAS; E. L. THOMPSON; JACK TILLERY; HOWARD TRIBBLE; CLYDE J. TUCKER; WILLIAM J. TUCKER; BILLY K. VILLINES; JAMES EVERETT VILLINES; STEVEN R. WAGNER; DONALD GENE WALLACE; FRANK J. WARD; EARL WARNER; JIM WASHBURN; CHARLES W. WATKINS; ERNEST L. WEEKS; CLYDE WELLS; ROBERT WHEALEN; JAMES WHITE; ELMO WILKERSON; CLAYTON C. WILKINSON; JOE LEE WILLIAMS; SAMMY WILLIAMSON; KENNETH WOODRUM; T. J. YSBRAND;

Plaintiffs - Appellants,

V.

OKLAHOMA LAW ENFORCEMENT RETIREMENT BOARD, as set forth in Oklahoma Statutes Title 47 § 2-300 Ct seq.; ROY ROGERS; LINDA AKER; SCOTT BEHENNA; RENDA REESE-DAVIS; MICHAEL DIXON; JIM IUNG; JUNE KLAASSEN; KEITH LEIMBACH; JAN MILLER; JAMES PETE PETERSON; HARRY ROSENGRANTS; KEVIN WARD; PHILIP R. KEY, each board members in their official capacity only,

Defendants - Appellees.

ORDER AND JUDGMENT

Before EBEL, LUCERO, and O'BRIEN, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Mickey D. Adam, other retired Oklahoma Highway Patrolmen, and some surviving spouses ("the Troopers") appeal a decision of the district court dismissing their complaint under FED. R. Civ. P. 12(b)(6) as barred by the statute of limitations. Exercising jurisdiction under 28 U.S.C. § 1291 (2002), we conclude the issues raised are moot and

dismiss the appeal.[1]

On March 8,2001, the Troopers filed suit against the Oklahoma Law Enforcement Retirement Board and board members ("Board"), claiming the Board, in calculating the Troopers' retirement benefits, violated their rights under the Oklahoma and U.S. Constitutions. The Troopers requested injunctive and declaratory relief.[2] When the troopers were hired, prior to July 1, 1980, Oklahoma law provided that after twenty years of service they would be eligible to receive a retirement benefit, payable monthly, calculated against

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[1]For the same reason, we dismiss the Troopers' appeal of the district court's denial of their FED. R. Civ. P. 59(e) motion to reconsider.

[2]Originally, the Troopers requested payment of unpaid retirement benefits, but later abandoned this claim without prejudice.

one-half ofthe prevailing annual base trooper salary.[3] On July 1, 1980, an amendment to this provision took effect and applied to all troopers eligible for retirement after the date of enactment.[4] It altered the means of calculating the retirement benefit, effectively lowering the monthly benefit as compared to the pre-1980 method of calculation. The Troopers challenged the application of this amendment to their retirement benefits, which they claimed were vested before July 1, 1980. None of the Troopers had retired prior to July 1, 1980.

The district court concluded the Troopers' cause of action arose on July 1, 1980, the effective date of the challenged amendment. Because the Troopers' complaint was filed more than twenty years after this date, the district court dismissed the Troopers' state and federal constitutional claims as time-barred under the statute of limitations

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[3]OKLA. STAT. tit. 47, § 2-305 (1979).

[4]OKLA. STAT. fit. 47, § 2-305(A) (July 1, 1980).

contained in OKLA. STAT. tit. 12, § 95.

As a preliminary matter, the Board argues this case is moot because the relevant statutes were amended after the district court rendered its March 5, 2002 decision. We review the issue of mootness de novo. Faustin v. City and County of Denver, 268 F.3d 942, 947 (10th Cir. 2001). "Mootness is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction." McClendon v. City ofAlbuquerque, 100 F.3d 863, 867 (10th Cir. 1996) (citation omitted). See also Faust in, 268 F.3d at 947.

> It has long been settled that a federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. For that reason, if an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed.

Church of Scientology of Cal. v. United States, 506 U.S. 9,

12 (1992) (quotation marks and citations omitted).

The Oklahoma Legislature amended OKLA. STAT. tit. 47, § 2-305 in its 2002 regular session.[5] The amendment, which took effect July 1, 2002, effectively resolved the Troopers' complaints concerning future retirement benefits they claim are due, granting the Troopers the relief they sought. This much the Troopers concede. However, the Troopers urge us to declare the Board's actions between July 1, 1980, and July 1, 2002, to have been unconstitutional. This we cannot do. "When a party seeks only equitable relief, as here, past exposure to alleged illegal conduct does not establish a present live controversy if unaccompanied by any continuing present effects." *McClendon,* 100 F.3d at 867. A "plaintiff cannot maintain a declaratory or injunctive action unless he or she can demonstrate a good chance of being likewise injured in the future." *Beattie v. United*

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[5] The amendatory language is found in re-numerated subsections C and D of OKLA.STAT. tit. 47, § 2-305 (July 1, 2002).

States, 949 F.2d 1092, 1093 (10th Cir. 1991) (quotation marks and citation omitted). The Troopers have made no such showing.

Accordingly, we conclude the issues raised by the Troopers in their appeal are moot, and **DISMISS** the appeal.

Entered by the Court:

TERRENCE L. O'BRIEN
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV 01-418A
(Marten)

MICKEY D. ADAMS, et al,

Plaintiffs,

vs.

OKLAHOMA LAW ENFORCEMENT RETIREMENT BOARD as set forth in Oklahoma Statutes Title 47 Sections 2-300 et seq., et al.,

Defendants.

MEMORANDUM ORDER

This matter is before the court on the plaintiffs' Motion for New Trial pursuant to Fed. R. Civ. Pr. 59. The court previously granted summary judgment in favor of defendants, holding that the plaintiffs' claims against the defendants based upon legislation altering the formula for calculating retirement benefits were time-barred under Oklahoma law. The plaintiffs present no argument in their motion which would justify the relief sought.

A motion to reconsider under Fed.R.Civ.Pr. 59(e) may be granted to correct manifest errors, or in light of newly discovered evidence; such a motion is directed not at initial consideration but reconsideration, and is appropriate only if the court has obviously misapprehended a party's position, the facts, or applicable law, has mistakenly decided issues

not presented for determination, or the moving party produces new evidence which it could not have obtained through the exercise of due diligence. *Anderson v. United Auto Workers*, 738 F.Supp. 441, 442 (D. Kan. 1989). A motion to reconsider is not "a second chance for the losing party to make its strongest case or to dress up arguments that previously failed." *Voelkel v. GMC*, 846 F.Supp. 1482 (D.Kan.), affd, 43 F.3d 1484 (10th Cir. 1994). The resolution of the motion is committed to the sound discretion of the court. *Hancock v. City of Oklahoma City*, 857 F.2d 1394, 1395 (10th Cir. 1988).

In its prior order, the court held that 12 O.S. Supp. 2000 § 95 governs the present action. Nothing in the Motion for New Trial supports the conclusion that this holding was in error. Plaintiffs acknowledge they have no direct authority for the proposition that they may commence an action challenging a legislative amendment over two decades after it became law. The plaintiffs' suggestion that the matter is somehow different because it raises constitutional issues, is simply
contrary to Oklahoma law. See City of *Oklahoma City v. Daly*, 316 P.2d 129 (Okla. 1957) (civil action asserting violation of state constitution was a claim "upon a liability created by a statute" within meaning of the statute of limitations). The plaintiffs make no attempt to explain how their action is consistent with Daly and the other authorities cited in the court's prior opinion.

Further, the various authorities the plaintiffs do cite are inapposite. *United States v. Wurts*, 303 U.S. 414, 418 (1938) and *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192 (1997) involve rights of action under federal law. Bay Area Laundry, for example, deals with rights under a specific federal statute, the Multiemployer Pension Plan Amendments Act of 1988, 29 U.S.C. § 1381. Neither case deals directly or indirectly with

Oklahoma law.

In sum, the time bar of § 95 applies. No basis has been shown for the application of any tolling provision under Oklahoma law.

IT IS ACCORDINGLY ORDERED this 17th day of July, 2002, that the plaintiffs' Motion for New Thai is hereby denied.

/s/ THOMAS MARTEN, JUDGE

Filed July 19, 2002